In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-643

FRANK RAPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of conspiring to import and distribute heroin and importing heroin in violation of 21 U.S.C. 846, 963 (count one) and 21 U.S.C. 812, 951(a), 952(a), 960(a)(1) and 960(b)(1) (count two). On April 14, 1972, he was sentenced to concurrent fifteen-year terms of imprisonment on each count and a consecutive three-year special parole term on each count. The court of appeals affirmed without opinion (Pet. App.).

1. Petitioner contends that the evidence is insufficient to support his conviction.

The evidence showed that one Berdin arrived in New York in September, 1971, to arrange for the sale of 94½ kilos of heroin to be smuggled into this country concealed in a car (Tr. 586-594, 132-135, 251-252, 414-417, 596-598). On September 22, Berdin met his French co-conspirator, who told him the heroin would arrive in a beige Ford, license number 3T289 (Tr. 598-600, 634-636). They attempted unsuccessfully to telephone their New York contact, "Lorenzo" (Tr. 600-603).[1]

On the same morning, co-defendant Giacomazzo and his Ford, license number 3T289, arrived from Italy aboard the S.S. Raffaelo. The Ford was removed from the ship, placed on the pier and inspected by a Customs Patrol Officer, who found a half-kilo bag of heroin in a fender well of the car. Giacomazzo and his travelling companion were placed under arrest. The car was fully searched and a total of 169 bags of heroin, weighing approximately 82 kilograms, were found hidden in the automobile. The heroin was removed and 168 bags of flour and one bag of heroin were replaced in the Ford in the same locations where the heroin had been found (Tr. 20-30, 39-50, 384-387, 417-419).

Later the same day (September 22, 1971), Giacomazzo was released, and began working for the government. He drove the Ford, which remained under surveillance, to his home in the Astoria, Queens, section of New York City (Tr. 136-137, 419-421). A short time after Giacomazzo parked the car and went into his

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[1] Co-defendant D'Aloisio's first name is Lorenzo.

house, co-defendant D'Aloisio, who lived one block from Giacomazzo, appeared, walked around the car, and looked into it twice (Tr. 65-67, 135-141, 254-255). That same evening Giacomazzo drove the Ford aimlessly around the neighborhood while D'Aloisio observed it on foot. They conversed briefly twice. (Tr. 67-73, 109-112, 142-147, 255-258, 350-351). At about 9:30 p.m. Giacomazzo drove over to Astoria Boulevard and met petitioner; Giacomazzo went up to him and briefly bent over and looked into petitioner's car. Giacomazzo then returned to the Ford and followed petitioner to a shopping center in Queens, where they both parked near the entrance to the parking area. Petitioner left his car, walked to Giacomazzo, who had remained in the Ford, and bent over at the driver's side. Immediately thereafter Giacomazzo drove his Ford to another section of the shopping center and parked directly opposite petitioner's residence. Giacomazzo left the Ford and spoke to petitioner again. Both men then departed, petitioner to his home across the way and Giacomazzo to Astoria by cab (Tr. 73-82, 147-151, 258-260, 360-365, 422-424).

The Ford remained parked at the shopping center until 11:00 p.m. the next day, September 23rd, when Giacomazzo drove it to the Grand Central Motor Inn in Astoria, where he parked it and then returned home (Tr. 82-84, 151-152, 260-261, 375-377).

At approximately 1:00 p.m. on September 24, Giacomazzo returned to the Ford at the Grand Central Motor Inn and drove it to another shopping center in Astoria. He parked the car and entered a diner there. At approximately 2:30 p.m. petitioner and D'Aloisio

walked together along Broadway, stopped, and spoke momentarily. D'Aloisio then walked back toward the diner and petitioner walked into the parking area of the shopping center where he entered a Buick Electra. Petitioner drove the Buick around the block, parked on Broadway directly across from the diner and waited in the car. Approximately 20 minutes later D'Aloisio walked from the vicinity of the diner and shortly thereafter, Giacomazzo left the diner, entered his Ford and drove off. As the Ford left the shopping center, petitioner followed it in the Buick (Tr. 155-161, 261-268, 427-434, 525-537).

With petitioner following, Giacomazzo drove approximately 35 miles on the Long Island Expressway. Both cars left the Expressway at the same exit but then returned to it and continued eastward, now with petitioner's Buick in the lead. After driving for approximately one mile, petitioner and Giacomazzo both pulled into a rest area, parked their cars and spoke briefly to one another. Petitioner then walked to a telephone where he was approached by an agent, who asked him for change. After telling the agent that he had no change, petitioner dialed a number, the last six digits of which were 98-2244, and said to the party who answered, "I am in Long Island; I am leaving now" (Tr. 272). Petitioner then returned to Giacomazzo and spoke briefly to him; at that point he and Giacomazzo switched cars. Petitioner was arrested as he attempted to drive the Ford away (Tr. 269-273, 434-439).

Seized from petitioner when he was arrested were the vehicle registration for the Ford and a piece of

cardboard with four telephone numbers written on it, one of which proved to be a coded form of D'Aloisio's home telephone number. (Tr. 274-276, 392, 397-410).[2]

Following his arrest, petitioner told customs agents that he had borrowed the Buick from a friend in New Jersey because his own Pontiac had a flat tire and that he had driven to Long Island to buy tires. He claimed that he had heard a noise in the Buick while driving over the Triboro Bridge and in order to ascertain the cause of the noise he drove off the bridge to the vicinity of the Astoria shopping center—approximately 2 miles away from the bridge. He insisted that he did not meet anyone there and that he parked in the rest area on the Long Island Expressway only after hearing the same noise that he had heard while on the Triboro Bridge. He also claimed that it was only a coincidence that he met Giacomazzo, whom he had not seen in 6 years, at the rest area (Tr. 277-279, 296, 442-443, 462-466).

Petitioner, who testified in his own behalf, repeated and elaborated the story he had given after his arrest concerning his meeting with Giacomazzo at the rest area. He admitted knowing Giacomazzo and D'Aloisio but denied seeing Giacomazzo or being in Astoria on September 22, 1971. He also denied that he had seen

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[2] Records of the New York Telephone Company established that ten calls were made during June and July from D'Aloisio's home phone number to petitioner's business in New Jersey, including one on the day Giacomazzo purchased the Ford. Records of the New Jersey Bell Telephone Company established that one call was made from petitioner's business in New Jersey to D'Aloisio's number (Tr. 392-396, 464).

Giacomazzo at the shopping center in Astoria on the day of the arrest; that he followed his car to Long Island; that he left the expressway and then reentered; and that he knew that there was heroin in Giacomazzo's Ford (Tr. 663-667, 671, 676, 712).

2. Petitioner's contention that the evidence was insufficient to establish his membership in the conspiracy and to establish his knowledge of its purpose is without merit. It is settled that participation in a criminal conspiracy may be established by circumstantial as well as direct evidence (*Delli Paoli* v. *United States*, 352 U.S. 232, 236 n. 4), and that direct or circumstantial evidence may justify an inference that a particular defendant had knowledge of the narcotics' illegal importation (*Mason* v. *United States*, 383 F. 2d 107 (C.A. 10)). As both courts below found, the evidence was sufficient for the jury to find that petitioner was a knowing participant in the conspiracy. Petitioner's repeated meetings under suggestive circumstances and his telephone conversations with D'Aloisio and Giacomazzo, and the exchange of automobiles, were sufficient to establish his involvement in the illegal endeavor.

Petitioner also contends that he was entitled to have the jury charged that where two inferences can be drawn, one of guilt and one of innocence, the one of innocence should prevail. This contention is also without merit. The jury here was properly charged as to the standards for reasonable doubt (Tr. 821-823) and such an additional instruction was not necessary. *Holland* v. *United States*, 348 U.S. 121, 139-140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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